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IN THE

Supreme Court of the United States

October Term, 1962

No. 880

SLOAN'S MOVING & STORAGE CO., INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees,

AND

UNITED PARCEL SERVICE, INC.,
Intervenor-Appellee.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF MISSOURI, E. D.

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Appellant, Sloan's Moving & Storage Co., Inc. (herein called "Sloan's") appeals from the judgment of the United States District Court for the Eastern District of Missouri, entered on September 11, 1962, dismissing its complaint which sought to set aside a final order of the Interstate Commerce Commission (herein called the "Commission"), and respectfully submits this Statement to show that the Supreme Court of the United States

has jurisdiction of the appeal and that substantial questions are presented which merit review and decision by this Honorable Court.

Opinion Below

The opinion of the District Court is reported in 208 F. Supp. 567 (1962) and is annexed hereto as Appendix "A". The decision and order of the Commission (Division 1) dated October 27, 1961, which adopted the Examiner's Report and Recommended Order is annexed hereto as Appendix "B".

Jurisdiction

This suit was instituted under Title 28 U. S. C. Sections 1336, 2321-2325 and Title 5 U. S. C. Section 1009, to set aside an order of the Commission. The judgment of the District Court dismissing the complaint was entered on September 11, 1962, and a notice of appeal was filed on or about November 7, 1962.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C. Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952); *United States* v. *Capital Transit Company*, 325 U. S. 357 (1945); *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236 (1945); *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515 (1946).

Questions Presented

There are three important questions presented by this appeal which involve the construction and administration of Part II of the Interstate Commerce Act (herein called the "Act") (49 U. S. C. Section 301, *et seq.*):

1. Where an application for operating authority covers a territory which embraces an area adequately served by existing carriers, may the Commission grant such authority merely because there was no proof of adequate service in the whole of the broader territory?

2. Where an application is made to serve a territory which embraces a smaller area adequately served by existing carriers, may the application be granted notwithstanding the evidence of adverse economic effect upon existing carriers?

3. Where in an application proceeding before the Commission the question of unlawful control within the meaning of Section 5 of the Act (Title 49 U. S. C. Section 5) is raised, may a new Certificate authorizing a new service be granted without a determination being made of the Section 5 issue and did the District Court err when it declined to review this issue on the ground that it was not formally raised in the proceedings before the Commission or is the Section 5 issue jurisdictional so that it cannot be waived?

There is, additionally, a vital public policy issue involved. If small independent carriers who provide concededly adequate service in a limited territory for which they hold a franchise can be driven out of business by large companies who employ as a technique of encirclement an application for a broad territorial area, the

National Transportation Policy will be subverted by a handful of carriers exercising oligopolistic power over rates, service and facilities.".

Statutes Involved

Sections 5(2), 5(4), 207(a) of the Act [49 U. S. C. Sections 5(2), 5(4) and 307] and Sections 8(b) and 10(e) of the Administrative Procedure Act [5 U. S. C. Sections 1007(b) and 1009(e)] which are set forth in Appendix "C" hereto are involved in this appeal.

History of Proceedings

On January 4, 1960, United Parcel Service, Inc. (herein called "United") a wholly owned subsidiary, of United Parcel Service of America, Inc., a Delaware corporation (herein called "Parent") applied for authority to conduct operations in interstate or foreign commerce, with certain exceptions, over irregular routes between all points and places in the States of Illinois, Indiana, Ohio and certain described portions of Wisconsin, Iowa and Missouri. The proposed authority was restricted, *inter alia*, to packages weighing not more than 50 pounds and not exceeding 108 inches in length and girth combined, each package to be considered a separate shipment and no more than 100 pounds to be transported from one consignor to one consignee in any one day.

The application was assigned for hearing, at which time the appellant and various motor carriers appeared as protestants. On or about April 26, 1961, the Examiner served his report and recommended that the application be granted, subject to certain limited restrictions.

Appellant and other motor carriers filed exceptions to the Examiner's Report and Recommended Order and thereafter Division 1 of the Commission, by its decision and order of October 27, 1961, adopted the Examiner's findings and directed the issuance of a Certificate. Acknowledging that appellant did render a satisfactory service in its area and was meeting the public's need for transportation service, the Commission nevertheless said:

> "Only a very small part of Sloan's overall traffic is exposed to diversion to applicant and such exposure is with respect to a type of traffic as to which Sloan's has demonstrated an ability to withstand applicant's competition in intrastate commerce and in the St. Louis Commercial Zone. As seen, even with the authority recently granted, this carrier can only transport packages between St. Louis on the one hand, and, on the other, very limited areas in Missouri and Illinois. Because of the territorial limitations in its authority, Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed. All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant a partial denial of the application" (p. 41 of the Examiner's Report).

Statement

A brief description of the parties and a summary review of the evidence presented before the Commission is submitted as a framework for consideration of the issues to be resolved by this Court.

(A) United holds a common carrier Certificate which authorizes the transportation of general commodities

from Chicago, Illinois to points and places in the States of Iowa, Michigan, Indiana, Illinois and Wisconsin. Additionally, United conducts exempt operations within the St. Louis Commercial Zone and operates in intrastate commerce within the State of Missouri. By the instant application, United sought to extend its authority to transport small packages in interstate commerce between all points in the States of Indiana, Illinois and Ohio, and described portions of the States of Wisconsin, Michigan, Iowa and Missouri.

The proposed service was represented to be speedier, more efficient and more economical than provided by United States parcel post and would be made available at comparable rates.

(B) Sloan's of St. Louis, Missouri, is authorized to provide an interstate common carrier parcel delivery service, restricted to parcels not exceeding 100 pounds between St. Louis, Missouri and a described area within the State of Illinois.

Sloan's physical operations, now completely blanketed by the Certificate granted to United, were and still are conducted at rates either equal to, or lower than, United's. The evidence of record showed that Sloan's service is identical with that which United proposed. The Commission did not find Sloan's service to be different from, or inferior to, United's.

At the time of the hearing, approximately sixty-five (65%) percent of Sloan's interstate business consisted of package freight and in a representative period of two weeks Sloan served 103 interstate points and more than ninety-eight (98%) percent of the packages transported weighed 50 pounds or less.

(C) Although United produced 190 so-called public witnesses, not one testified to a *bona fide* need for service into or out of Missouri which is not adequately provided by existing carriers. An analysis of the testimony in support of the application shows that United failed to prove one element of public convenience and necessity as required by Section 207 (49 U. S. C. Section 307). There was no complaint about truck service, except the vague charge that ordinary trucking rates are too high. This allegation was not directed against Sloan's since its rates are the equivalent of United's. Although there were bald assertions that a single shipper has shipments of parcels moving within and beyond Sloan's authorized territory, the true facts are that there was not a *scintilla of evidence* that the shipper requires the same carrier to service Sloan's territory and points beyond. Of the hundreds of shippers served by Sloan, only five purported "complaints" were noted and their nebulous and factitious character was recognized by the Commission when it omitted to discuss them.

The Court below, the Commission and United have relied upon the length of the Examiner's Report and the *caveat* that a Court ought not disturb the Commission's evaluation of the so-called factual evidence. But they cannot claim that there was substantial evidence of record to support the arbitrary conclusions reached. Indeed, the Commission could not, and did not, find that there was any deficiency of service or that there was a need for United's service to and from Missouri.

The Questions Are Substantial

This appeal presents substantial and important questions concerning the interpretation and application of Part II of the Act.

1. The Court below disregarded the statutory provisions relating to public convenience and necessity and the relevant decisional precedents when it held that a new Certificate may be issued notwithstanding that adequate service is available and existing facilities will be adversely affected. The Court also erred in approving the incorrect assignment, by the Commission, of the burden of proof to the protestants and treating the Commission's surmise and conjecture about future needs for service as ultimate facts when there was no substantial evidence of record to support these speculative findings.

2. The Court below placed an incorrect gloss upon this Court's decision in *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151 (1957) and misread *United States* v. *Marshall Transport*, 322 U. S. 31 (1944). It is urgent, therefore, that this Court announce, in a definitive way, whether or not Section 5 of the act is jurisdictional (Appendix "A", pp. 31-33).

I

Concededly, when there is a "rational basis for the conclusions approved by the administrative body", the judicial function is exhausted. [*Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286 (1934); *I. C. C. v. Inland Waterways Corp.*, 319 U. S. 671 (1943); *Proctor & Gamble* v. *United States*, 225 U. S. 282 (1912).] Conversely, if the findings of an administrative agency are arbitrary or if the evidence is palpably insubstantial or if essential basic findings are omitted, the conclusions reached by the agency cannot stand. [*United States* v. *B & O. R. Co.*, 293 U. S. 454 (1935); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Standard Oil Co. (Indiana)* v. *United States*, 282 U. S. 194 (1931).]

1. In this case, the Commission committed one error which, standing alone, warrants relief from its order.

Simply stated, the Commission violated the statutory mandate when it imposed upon Sloan's the burden of proof that the public convenience and necessity did not require the proposed service:

> "All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant partial denial of the application" (p. 41 of the Examiner's Report).

Although the District Court recognized that the burden of proof was upon United, it sought to rationalize the Commission's error by asserting that:

> "Sloan bases its contention upon the isolated statement in the Examiner's report ending * * * This sentence is part of the excerpt of the Examiner's report set out in Division I. The sentence says nothing expressly about burden of proof. When this sentence is read in context and in the light of the report as a whole, it is perfectly clear that the burden of proof is not placed upon Sloan. It would appear that the examiner was merely saying in substance that the evidence offered by Sloan did not overcome the showing made by UPS upon the existence of a need for its service" (Appendix A, p. 29).

This was not an "isolated" statement; it was the essence of the applicant's case and the only basis for the Commission's order and this explains why the Commission disregarded the utter lack of proof of public convenience and necessity by United.

The District Court was probing the Examiner's mind when the language was clear and explicit and did not

require interpretation. Indeed, the Examiner's statement makes no reference to the evidence adduced by United because he assumed, as did the Commission, that Sloan's had the negative burden of disproving what United had to prove affirmatively.

2. The Court incorrectly suggests that Sloan's relied primarily upon the "adequacy of its service" as a bar to the issuance of additional operating authority. Sloan's did not and does not urge that adequacy of existing service is an absolute bar to a grant of new authority or that it has a vested right to be immunized against competition. But adequacy of service is very much in issue here, since the Commission granted authority to United because it incorrectly concluded that Sloan's service was inadequate for the whole territory involved, and then based its Order upon this very element.

Thus, by finding that "because of territorial limitations in its authority, Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed" (p. 41 of the Examiner's Report), the Commission made adequacy of service a seminal issue. Hence, if there was no factual basis for the Commission's finding that Sloan's service was inadequate, the order and the judgment below must be vacated. The fact is that there was not an iota of proof of a public need for one carrier to provide service in *Sloan's territory and beyond it*. Not one witness showed or testified to a need for a single carrier to handle shipments in every segment of the territory applied for by United.

The inability of Sloan's to serve an area beyond its franchised territory does not prove a public need for the alleged service offered by United within Sloan's territory; and the fact that a shipper may occasionally require service beyond Sloan's territory does not prove

that service is required, from the same carrier, in Sloan's authorized territory. Even if it were true that "witnesses from every portion of this territory beyond Missouri gave evidence that they shipped parcel post packages every week to Missouri" and from Missouri's points to points "beyond the area served by Sloan's", this does not, and cannot, justify a need for United's service within Sloan's territory. Since there is no finding that within its territory Sloan's cannot fulfill the public's need, the order was erroneous.

The issue is not whether Sloan's can serve the broad territory which United described in its application but whether service is adequate within Sloan's territory and whether Sloan's is entitled to protection against aggressive competition for which no public need was shown. The Commission cannot arbitrarily discard the rule which instructs that when a carrier satisfactorily serves a portion of the proposed territory in single line service and can serve the rest of the territory by an interline arrangement, an application for a new service must be denied. Direct single line service is not, and never has been, the test of public convenience and necessity:

> "The shipper is not entitled as a matter of right to direct motor carrier service to every point to which it ships when reasonably adequate interline service is available. Existing carriers have substantial investments in operating rights, facilities, and equipment necessary to institute and sustain their operations, and they are entitled to all the traffic they can handle adequately, and economically in the territories which they serve without the competition of an additional service." *Pine Tree Transport, Inc., Extension—Frozen and Canned Fruit*, 54 M. C. C. 669, 675 (1952). [Compare Kenosha Auto Transportation, 62 M. C. C. 824 (1954).]

In the absence of any evidence that an interline arrangement afforded by Sloan's has been utilized and found deficient, the Commission could not rationally find that "Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed". Since this was the only alleged deficiency in Sloan's available service, the Commission's findings must be rejected. Furthermore, United failed to show that the services of existing carriers did not meet the reasonable transportation requirements of the shipping public.

Assuming, *arguendo*, that there was a need for service beyond Sloan's territory, the Commission could have granted a part of the authority and excluded therefrom the territory now served by Sloan's and others. In hundreds, indeed thousands of cases, a part of an application has been denied where the Commission has found that a particular area, embraced within the larger territory applied for, is adequately served. There are hundreds of carriers who have limited territorial grants of authority and the Commission has denied applications where these territories are subject to invasion by applicants who seek authority to serve the same and additional territory.

3. Compounding the District Court's erroneous analysis of the evidence is its statement that:

> "While the evidence as to the extent of the likely diversion of Sloan's small parcel business by the proposed UPS service is conflicting, we cannot say that the Commission failed to give this aspect of the case full consideration". (Appendix "A" p. 27).

The short answer is that if the "complete" territorial service which United proposed was required by the public then it is obvious that shippers will, in fact, divert business

from Sloan's and the Commission's conclusion that only "a small part of Sloan's overall traffic is exposed to diversion" is absurd. On the other hand, if there will be no diversion from Sloan's, it must follow that there is no need for United's service in Sloan's territory.

Of course, the Commission was obliged to acknowledge that the protestants' traffic (and particularly Sloan's) is exposed to diversion. Whether the amount of traffic which is subject to diversion is large or small is irrelevant. The Commission has uniformly ruled that all segments of a carrier's traffic are vital and this is particularly true with respect to package freight which, as United's witness admitted, can only be successfully handled if a large volume is available. Obviously, a carrier with extensive authority has a decided competitive advantage and for that reason the Commission has always held that a shipper has no right to single line service. In these circumstances, the Commission is charged with the obligation to protect the traffic of small but active carriers which in this case it utterly failed to do.

Shippers who may require service within and beyond Sloan's territory are not likely to split up their traffic between two carriers and this traffic must ultimately be captured by United. Speculation by the Commission about Sloan's ability to compete with United in the exempt area is not only incorrect but idle.

> "It is well established that an existing carrier generally should have the right to transport all the traffic it can handle adequately and efficiently in the territory it is authorized to serve, without the added competition of a new operator" (*Law & Ingham Transportation Co. Inc., Extension*, 13 Federal Carrier Case (C. C. H.) Par. 34,788 (1957)).

In *J. L. Querner, Extension—Frozen Foods*, 62 M. C. C. 820 (1953), the Commission stated:

> "The creation of the proposed new operation and service would merely permit applicant to divert traffic now being handled by other carriers in reasonably satisfactory manner. The public interest requires that carriers already in the territories involved be protected from an invasion of such territories by a new carrier in the circumstances here present."

Moreover, many parcel delivery companies in St. Louis have gone bankrupt because of their inability to withstand increased competition. And the record showed that where Sloan's and United were direct competitors, the former's package traffic was radically reduced, forcing Sloan's to rely upon a declining retail business for survival. Now the Commission adds the last straw and this violates the elementary rule that when a carrier has expanded its resources and facilities to handle all available traffic, it is entitled to protection against a new competitive service not only for its own survival, but because stability and sound economic conditions in the industry dictate this course.

The District Court's finding that "* * * we cannot say that the Commission failed to give this aspect of the case full consideration" (Appendix A, p. 27) is not only irrelevant but wrong. The issue is not whether consideration of the issue was given by the Commission, but rather whether the Commission's conclusions are supported by substantial evidence of record. Surely, a conclusion predicated on speculation that the diversion will not be great, does not sanction Court approval particularly when the surmise is unfounded.

4. The District Court made reference to the decision in *Railway Express Agency, Inc. v. United States*, 205 F. Supp. 831 (D. C. S. D. N. Y., 1962), where the validity of the subject Certificate was upheld. The fact is, however, that aside from the irregular-regular route issue, none of the issues presented to the District Court were the subject of the *Railway* case. Accordingly, reference to that decision was unwarranted. So, too, the fact that various United companies have been authorized by the Commission to establish a parcel delivery service similar to that here proposed in different areas of the country is irrelevant (*e.g., United Parcel Service, Inc.—Common Carrier Application*, 68 M. C. C. 199 (1956) aff'd *Railway Express, Inc. v. U. S.*, 153 F. Supp. 738 (S. D. N. Y. 1957) aff'd *per curiam*, 355 U. S. 270 (1960); *United Parcel Service of New York, Inc.*, 79 M. C. C. 629 (1960); 185 F. Supp. 96 (D. C. S. D. N. Y. 1960), aff'd *per curiam*, 365 U. S. 566 (1960)].

Earlier cases are easily distinguishable. In those cases, the Commission found that: (a) motor common carriers did not regularly provide parcel delivery service or embargoed such traffic; (b) motor common carriers who provided parcel delivery service did so at high minimum rate charges; (c) motor common carriers did not establish specialized methods and techniques for handling small parcel traffic; and (d) shippers complained of inadequate service. Here, however, the applicant was opposed by a carrier who provides, at comparable rates, the identical service proposed by United or one of its affiliates.

5. The District Court committed reversible error when it held "Sloan's contention that Section 5 limits the Commission's jurisdiction to grant a certificate under Section 307 without merit" (Appendix A, p. 33). That

the Court incorrectly treated Section 5 and Section 207, as unrelated provisions of the Interstate Commerce Act is made self-evident by the legislative history of the statute and the decisional precedents. At the very outset of the regulation of interstate motor carriers, there was a provision similar to Section 5, namely, Section 213 (Motor Carrier Act of 1935, Ch. 498, Section 213(a) (1), 49 Stat. 556). Section 213 was subsequently repealed by the Transportation Act of 1940 (Ch. 722, Title 1, Section 21(e), 54 Stat. 924), and Section 5 of Part I of the Act was incorporated into Part II. Hence, no franchise may be granted to one who fails to comply with Section 5 of the Act since such default is inconsistent with a finding of fitness required under Section 207 (Appendix C, p. 39). Indeed, it is fundamental that the Commission cannot and will not approve a common carrier application if there is a violation of Section 5(4) of the Act. [*M. J. Hannon-Control-Hannon Motor Lines, Inc.*, 39 M. C. C. 620 (1944); *Schwerman Trucking Co. of Texas*, 80 M. C. C. 382 (1959)]. In *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944), this Court held that the Commission could not proceed with, much less grant, an application which involves an unapproved control relationship otherwise subject to Section 5 of the Act.

The *Marshall* doctrine was not attenuated by this Court's decision in *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151 (1957). Contrary to the District Court's construction, Section 5 is jurisdictional and the Commission may not approve applications where a controlling carrier or non-carrier is not party to a control application. While it is true that Section 5 is "not strictly jurisdictional in the sense that if the Commission wrongly decides" that A does not control B which seeks to control C that "the Commission loses jurisdiction over B, the power to regulate B" (*Alleghany Corporation* v. *Breswick & Co.*,

supra, at pp. 171-172), this means only that if the Commission reaches a wrong decision exculpating a person or corporation from regulation under Section 5, it does not foreclose the later assertion of jurisdiction by the Commission. The very illustration provided in the *Alleghany* case, *supra*, exposes the egregious error of interpretation committed by the District Court [*Gilbertville Trucking Co. Inc., et al.* v. *United States, et al.*, 371 U. S. 115 (1962)].

Neither the precedent in *Yale Transport Corp.* v. *United States, supra*, nor the decision in *Pan-American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810, (C. A. 2, 1941), suggest that Section 5 is not applicable in this case. In the *Pan-American Airways Co.* case, *supra*, the Court of Appeals decided that a control application (under Section 408(a) of the Civil Aeronautics Act) is required where a subsidiary becomes an air carrier by reason of an application for a Certificate but it then concluded that the Certificate could not be withheld pending the processing of a Section 408 application. The subsequent Supreme Court decision in *Marshall*, *supra*, and the subsequent *Schwerman* decision, *supra*, shows that the Commission is without authority to issue new operating authority to a motor carrier unless a previously unapproved control relationship is sanctioned. In *Schwerman*, *supra*, the Commission refused to issue a permit until a Section 5 application was filed and approved and the Commission was then aware of the decision in *Pan-American Airways Co.*, *supra*, as the report in the *Hannon* case, *supra*, shows:

> "It is apparent that without approval under Section 5(2) to control the two motor carriers, Hannon would immediately be in violation of the specific prohibition of section 5(4) upon his exercise of the authority granted under Section 209.

> The words 'or otherwise' appearing in Section 5(2) are broad enough to encompass what Hannon proposes as a permissively lawful transaction thereunder, and which we are empowered to approve if we find it to be consistent with the public interest. Compare Pan American Airways Co. v. Civil Aeronautics Board, 121 Fed. (2d) 810 (p. 622)."

A brief description of the "United family" discloses the Section 5 violation.

United is part of a complex of many companies. At the apex of a vast pyramid is United Parcel Service of America Inc., the Parent, a Delaware corporation which owns all of the issued and outstanding stock of four classes of motor carirers: (a) companies which were engaged in contract carriage prior to 1935, and therefore, were granted so called "grandfather" permits; (b) a carrier who secured authority after 1935; (c) a non-carrier which by an acquisition proceeding under Section 5 acquired operating authority subsequent to 1935, and (d) contract carriers including United which acquired common carrier authority since 1935.

(a) *United* which holds a permit issued under the "grandfather" clause; a Certificate issued in 1957; and the Certificate which is the subject matter of this suit.

(b) *United Parcel Service of New York, Inc.,* which holds a contract carrier Permit No. MC-63063 issued in 1953 and a common carrier certificate granted by the Commission in 1960.

(c) *United Parcel Service of Pennsylvania, Inc.*, which holds Contract Carrier Permit No. MC-89529, issued in 1940 under Section 209 of the Act (49 U. S. C. Section 309). Extensions of this contract carrier authority were obtained on October 5, 1951, April 25, 1951 and on June

18, 1955. At no time was a Section 5 application filed seeking the Commission's approval of the Parent's control over this company.

(d) *United Parcel Service of America, Inc.*, (a Nevada corporation), a non-carrier which owns all of the stock of United Parcel Service of Portland. The latter acquired the contract carrier operating rights (Permit No. MC-35480) of A. J. Wiese on October 20, 1941. The parent corporation was not a party to this application and accordingly, the Commission has never approved this control relationship.

The District Court suggests that the unlawful control issue was not properly raised before the Commission. Aside from the fact that the issue was presented during the course of the hearing (Tr. 468-469) and that the Commission knew about the control relationships within the United family, it was United's affirmative statutory obligation to seek Commission approval of the control relationships. Failing such application and approval, the Commission lacked jurisdiction to grant the Certificate. In summary, even if the issue was not raised, the Commission could not lawfully issue a Certificate. Accordingly, the District Court's reliance upon this Court's decision in *U. S. v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952), is misplaced.

The District Court's reliance upon *American Trucking Association v. United States*, 355 U. S. 141 (1957) (Appendix "A", p. 32), to support a conclusion that Section 5 is not applicable to a Section 207 proceeding is misplaced. Only in the limited situation where a railroad motor carrier subsidiary establishes "special circumstances" may the applicant be granted unrestricted motor carrier authority despite the prohibitions of Section 5.

However, this Court did say in the cited case (pp. 151-152):

> "the underlying policy of §5(2)(b) must not be divorced from proceedings for new certificates under §207."

Moreover, the portion of this Court's opinion in *American, supra,* which was relied upon by the District Court concerned the legislative history of Section 5(2)(b), which is obviously not at issue.

It cannot now be argued that the Section 5(4) violation in this case was "technical" and that it would be unfair to penalize the applicant for a *bona fide* error concerning the applicability of Section 5 of the Act. Concededly, the Section 5 issue was presented to the United States District Court for the Southern District of New York in *Yale Transport Corp.* v. *United States, supra,* and was rejected by that Court. On appeal, the United States Supreme Court affirmed the decision of the United States District Court (Mr. Justice Black "dissenting") and a petition for rehearing was denied by the Supreme Court [369 U. S. 566 (1961), 366 U. S. 947 (1961)]. But the circumstances here are different because United was forewarned of this issue when the instant case was pending before the Commission. Hence this is not an instance of retroactive application of the statute which will deprive United's Parent or any of the subsidiary motor carriers of any rights which they obtained from the Commission. There is no demand here that the Commission set aside past consummated transactions. Sloan's asks only that there be compliance now and that the illegal relationship be cured before any application is granted.

Conclusion

It is respectfully submitted that the decision of the District Court fails to recognize that the Commission may not approve an application if an illegal control relationship exists; that public convenience and necessity was not established in this case; and that the Commission may not grant a Certificate unless the order is bottomed upon basic findings supported by substantial evidence.

Appellant believes that the questions presented by this appeal are substantial and of importance not only to the public generally, but to the Commission and those who are regulated by, and are subject to the jurisdiction of that agency.

Respectfully submitted,

HERBERT BURSTEIN and G. F. GUNN, JR.,
Attorneys for Sloan's Moving & Storage Co., Inc.

February 27, 1963.

Appendix A

Opinion of United States District Court for the Eastern District of Missouri

VAN OOSTERHOUT, Circuit Judge.

Sloan's Moving & Storage Co., Inc. (hereinafter called Sloan) brings this action against the United States and the Interstate Commerce Commission to set aside and annul in whole or in part the order of the Commission, dated October 27, 1961, in MC-115495 (Sub. No. 3) granting the application of United Parcel Service, Inc. (hereinafter called UPS) for a Certificate of Public Convenience and Necessity authorizing UPS to operate as a common carrier by motor vehicle of small parcels over irregular routes.

The nature of the transportation service applied for and granted is described in detail in the Commission's order. Briefly summarized, UPS sought authority to transport packages (excluding certain specified types) weighing not more than 50 pounds and not exceeding 108 inches in length and girth combined, between all points in the states of Illinois, Indiana and Ohio, and in specified portions of the states of Missouri, Michigan, Wisconsin and Iowa, except that no service would be afforded for delivery between retail stores and their branches or warehouses or between retail stores and their customers. At the hearing a further restriction was added that not more than 100 pounds of packages from one consignor at one location to one consignee at one location would be accepted on any one day. The parties are completely familiar with the nature and characteristics of the proposed UPS service and such service is similar to that described in some detail in Yale Transport Corp. v.

United States, D. C. S. D. N. Y., 185 F. Supp. 96, affirmed per curiam 365 U. S. 566, 81 S. Ct. 754, 5 L. Ed. 2d 806.

Jurisdiction of this court is invoked under 28 U. S. C. A. §§1336, 2321-2325, and 5 U. S. C. A. §1009. This three-judge court, constituted as required by 28 U. S. C. A. §2284, has convened for the purpose of hearing and determining this case.

UPS was permitted to intervene as an additional defendant. By stipulation of counsel for all parties and order of this court, this case was set for hearing on July 19, 1962, on the issue of Sloan's right to the permanent injunction prayed for in its complaint. The case was reached for hearing on July 19, 1962. A certified copy of the records of the proceedings before the Commission, including the evidence introduced, the exhibits, the report of the examiner, and all orders of the Commission were received in evidence. Counsel for all parties filed timely written briefs and orally argued the case, whereupon the case was submitted and taken under advisement.

Sloan urges that it is entitled to have the challenged certificate issued to UPS declared null and void in whole or in part, for the following reasons:

"Point I.

"There is no evidence that the present and future public convenience and necessity requires United's service and the findings made by the Examiner were not supported by substantial evidence."

"Point II.

"The Commission incorrectly imposed the burden of proof upon the protestants."

"Point III.

"The Commission departed from the decisional precedents in granting United irregular route operating authority."

"Point IV.

"The certificate should not have been issued to United because there was a violation of Section 5 of the Interstate Commerce Act."

"Point V.

"There will be dual operations directly in violation of Section 210 of the Interstate Commerce Act, Part II."

Such points will be considered in the order stated.

I.

[1] Sloan challenges the sufficiency of the evidence to support the Commission's finding that present and future public convenience and necessity requires UPS' proposed service. The findings relating to UPS' ability, willingness and fitness to perform the service are not challenged. The rules relating to the scope of judicial review of the Commission's findings are well established and are not in dispute. The Interstate Commerce Act in general, and §207 thereof—49 U. S. C. A. §307[1]—in particular, give the Commission a broad grant of authority to pass upon present and future public convenience and necessity. Orders

[1] In referring to the provisions of the Interstate Commerce Act, we will use the section numbering as found in 49 U. S. C. and 49 U. S. C. A.

of the Commission based upon adequate findings and supported by substantial evidence cannot be upset. United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515, 535-536, 66 S. Ct. 687, 90 L. Ed. 821; Convoy Co. v. United States, D. C. Ore., 200 F. Supp. 10, 12-13.

In Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 286-287, 54 S. Ct. 692, 693, 78 L. Ed. 1260, the court states: "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

UPS' application was heard by Hearing Examiner Lawrence A. Van Dyke, Jr. After hearing 193 public witnesses, the calling of public witnesses was discontinued by the examiner upon the basis that additional testimony by such witnesses would be only cumulative. The record consists of 6391 pages and 402 exhibits. The examiner, in a 48 page report, makes a detailed analysis of the evidence, makes findings, discusses the legal issues, and makes a determination that the present and future public convenience and necessity require the operation proposed by UPS. Sloan, among others, participated in the hearing and filed exceptions to the examiner's report. The Commission, after due consideration, found the exceptions filed to be without merit and approved, affirmed and adopted the examiner's statement of facts, conclusions and findings, and authorized the issuance of the certificate as recommended by the examiner. Petition for reconsideration was denied on December 7, 1961. The certificate authorized by the order was issued to UPS on January 18, 1962.

Sloan, although conceding that the examiner made the essential ultimate findings in statutory language, urges, "In this case, there is no rational support, in terms of adequate basic findings, for the conclusions which the

Examiner cast in statutory language. The fact is that the basic findings which were made were not supported by substantial evidence of record."

[2] Sloan stresses that there is no express finding of inadequacy of the existing service. Sloan concedes that the absence of such finding does not invalidate an order of the Commission. See Convoy Co. v. United States, supra; A. B. & C. Motor Transp. Co. v. United States, D. C. Mass., 69 F. Supp. 166, 169.

Sloan argues "the fact that a finding of inadequacy is not required, does not justify a new Certificate when service within a given territory is adequate and the Commission cannot disregard the existence of adequate service." It would seem obvious that if a finding of inadequacy of service is not required, evidence to support such a finding should not be a prerequisite to the Commission's right to grant the certificate. 49 U. S. C. A. §307 expressly provides that the issuance of a certificate does not confer any proprietary interest in the use of the public highways upon the certificate holder. Doubtless the adequacy of existing service is a factor which the Commission should consider in determining whether any authority should be granted. The record before us reflects the examiner and the Commission gave full consideration to the available existing service.

Sloan also complains about the examiner's determination that Sloan's business would not be seriously adversely affected. The examiner's report includes the following:

> "Sloan's is engaged in the household moving and storage business, general hauling, and parcel delivery service. In 1959 carrier had operating revenues of $948,592; of which about 50 percent was

obtained from its parcel delivery business. A survey during a 10-day period from June 20 through July 1, 1960, disclosed that 25,878 packages were transported in both intrastate and interstate commerce, of which only 3,594, or about 14 percent of all packages surveyed, were transported in interstate commerce in the wholesale type of service proposed herein. Only a very small part of Sloan's overall traffic is exposed to diversion to applicant and such exposure is with respect to a type of traffic as to which Sloan's has demonstrated an ability to withstand applicant's competition in intrastate commerce and in the St. Louis Commercial Zone. As seen, even with the authority recently granted, this carrier can only transport packages between St. Louis, on the one hand, and, on the other, very limited areas in Missouri and Illinois. Because of the territorial limitations in its authority, Sloan's cannot provide the complete service which is proposed by applicant and shown to be needed. All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant a partial denial of the application."

While the evidence as to the extent of the likely diversion of Sloan's small parcel business by the proposed UPS service is conflicting, we cannot say that the Commission failed to give this aspect of the case full consideration.

Sloan's territory extended only approximately 75 miles out from St. Louis. UPS proposed to furnish direct service to a much larger territory. There is substantial evidence to the effect that much of UPS' contemplated business would be derived from shippers using parcel post service which service they found to be unsatisfactory.

In disposing of a similar contention, the court in the Yale Transport case, supra, states:

> "Of course, no two cases of this sort are exactly alike and the present record does appear to contain a more impressive showing of the service being offered by presently certificated carriers than did that in the Chicago case. [68 M. C. C. 199] Nevertheless, any differences in the evidence as to the value of UPS' service, the availability of other service, and diversion, are not sufficient to take the case out of the area committed to the Commission's judgment." 185 F. Supp. 101.

The validity of the certificate here under attack was upheld in Railway Express Agency, Inc. v. United States, D. C. S. D. N. Y., 205 F. Supp. 831. In that case, the certificate here involved was attacked by Railway Express Agency (hereinafter called REA). Sloan was not a party to that case and is not bound by the result. There are also factual differences between Sloan's position and that of REA. In the cited case, competition existed in a much larger geographical area. Nevertheless, said decision substantially supports the Commission's determination on the public convenience and necessity issue.

[3] We cannot, within the proper limits of an opinion, adequately discuss all the extensive materjal evidence bearing upon public convenience and necessity. Our examination of the record satisfies us that the essential findings made by the examiner and adopted by the Commission are supported by substantial evidence and that such findings support the Commission's order authorizing the certificate.

II.

[4] Sloan asserts that the Commission erroneously placed the burden of proof upon it to establish that present and future public convenience and necessity does not require the proposed service. We fully agree with Sloan's view that the burden of proof rests upon the applicant to establish public convenience and necessity. We are satisfied that the decision of the examiner and the Commission was not induced by any erroneous view of the law relating to burden of proof. Sloan bases its contention upon the isolated statement in the examiner's report reading, "All factors considered, it is concluded that the evidence submitted by Sloan's does not warrant a partial denial of the application." This sentence is a part of the excerpt of the examiner's report set out in Division I. The sentence says nothing expressly about burden of proof. When this sentence is read in context and in the light of the report as a whole, it is perfectly clear that the burden of proof is not placed upon Sloan. It would appear that the examiner was merely saying in substance that the evidence offered by Sloan did not overcome the showing made by UPS upon the existence of a need for its service.

III.

[5] We find no basis for reversal in Sloan's contention that the Commission departed from its decisional precedents in granting UPS irregular route operating authority. It is by no means certain that the Commission departed from its precedents. In any event, a court on review is not concerned with the consistency or inconsistency of the Commission's decisions. Virginian Ry. Co. v. United States, 272 U. S. 658, 665-666, 47 S. Ct. 222,

71 L. Ed. 463; Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 271, 46 S. Ct. 500, 70 L. Ed. 941; Ace Lines, Inc. v. United States, D. C. S. D. Iowa, 197 F. Supp. 591, 599.

[6] More importantly, substantially the same issue was raised by REA in its attack upon the identical certificate here involved in Railway Express Agency, Inc. v. United States, supra. Judge Friendly in that case adequately demonstrates that the Commission acted within its statutory authority and committed no error in issuing the certificate here before us. Among other things, he states:

> "However, we read §208 of the Motor Carrier Act as authorizing but not requiring the Commission to limit a freight carrier to 'specified routes'; it says, quite specifically, that if operations are 'not over specified routes or between fixed termini', it is enough for the Commission to name 'the territory within which, the motor carrier is authorized to operate.'
>
> * * * * * *
>
> "The Commission, and the industry, knew what service UPS proposed, and the Commission, in granting the application, must have intended to issue a certificate permitting what UPS had asked and for which, as the Commission found, it had proved public convenience and necessity and fitness, willingness and ability. So far as the statute goes, the Commission could have issued a certificate permitting exactly that and saying nothing more; if it chose to baptize the document with a title from its catalogue which it thought closest to being apt, no legal rights of REA are violated if the fit be not altogether precise." 205 F. Supp. 836, 837, 838.

IV.

[7] Sloan asserts that United Parcel Service of America, Inc., the parent corporation which owns all of the stock of UPS, and other carriers in the United Parcel Service family, should all have been made parties in the instant application and that the Commission's approval of the corporate control membership involved should have been sought pursuant to 49 U. S. C. A. §5(2), and that the failure so to do is a bar to the issuance of the certificate here under attack. We agree with the contention of the Commission and UPS that the unlawful control issue was not adequately raised before the examiner or the Commission by appropriate pleading, briefs, exceptions or otherwise. All that Sloan's reference to the raising of this issue shows is that Sloan's counsel started to question a UPS witness as to whether §5 proceedings had been instituted, whereupon UPS counsel conceded that the parent corporation had not filed a §5 application. Discussion between counsel revealed that the violation of §5 was in issue in the Yale Transport case, supra, whereupon Sloan's counsel stated, "Depending upon the outcome of that case, the issue might become more or less material in this case." Neither the examiner nor the Commission discussed the unlawful control issue. In United States v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33, 37, 73 S. Ct. 67, 69, 97 L. Ed. 54, the court states:

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

See Southern Kansas Greyhound Lines, Inc. v. United States, D. C. W. D. Mo., 134 F. Supp. 502, 510-511.

[8] We are satisfied that the unlawful control issue was not properly raised before the Commission and hence we decline to consider such issue except to the limited extent of determining Sloan's contention that the Commission lacked jurisdiction to grant the certificate. Sloan contends that conformity with §5 relating to control proceedings is a prerequisite to the granting of a certificate under §307. This argument is premised on the words of §307 requiring the applicant "to conform to the provisions of this chapter." Section 307 is part of Part II of the Interstate Commerce Act and likewise a part of Chapter 8. Section 5 is found in Part I of the Act and in Chapter 1. Obviously §5 is not a part of the division or chapter containing §307. Thus, it is clear §307 does not specifically require an applicant under §307 to conform to §5, nor can such requirement be fairly implied.

In American Trucking Ass'ns, Inc. v. United States, 355 U. S. 141, 78 S. Ct. 165, 2 L. Ed. 2d 158 plaintiff, a rail owned carrier, was unable to obtain approval under §5(2) (b). Plaintiff then sought a certificate under §307, which certificate was granted and upheld. The Supreme Court, in holding that §5 does not limit §307, states:

> "The legislative history of the Motor Carrier Act of 1935 gives no indication that §213(a) (1), the predecessor of §5(2) (b), was to be considered a limitation on applications under §207.
>
> * * * * * *
>
> "In interpreting §207, the Commission has accepted the policy of §5(2) (b) as a guiding light, not as a rigid limitation.
>
> * * * * * *

> "We conclude, therefore, that the Congress did not intend the rigid requirement of §5(2) (b) to be considered as a limitation on certificates under §207 [49 U. S. C. A. §307.]."

We hold that Sloan's contention that §5 limits the Commission's jurisdiction to grant a certificate under §307 is without merit.

Inasmuch as we have held that the unlawful control issue to the extent that it goes beyond the jurisdictional issue is not properly before us, we express no opinion thereon. But see Yale Transport Corp. v. United States, supra, and Yale Transport Corp. v. United Parcel Service, MC-F-7321 (dismissing the §5(7) proceedings).

V.

[9] Sloan's attack upon the certificate upon the ground that the dual operation it authorizes violates 49 U. S. C. A. §310 is without merit. It is true that UPS served as a contract carrier for retail delivery service to a limited extent in Cincinnati. The Commission recognized this situation and gave it full consideration. It imposed conditions and reserved the right to impose additional conditions to protect the public interest and guard against any discrimination that might result from dual operation.

Title 49 U. S. C. A. §310, relating to dual operation, permits the Commission, for good cause shown upon a finding that both contract and common carrier service may be held consistently with the public interest and in the national transportation policy, to authorize dual operation. The appropriate finding, backed by evidentiary support, was here made. The situation and the conditions here imposed resemble closely those existing in Yale Transport, supra, where the dual operation was approved.

We conclude that there was a factual and legal basis for the Commission's order and the certificate issued pursuant thereto, that Sloan has not demonstrated that the Commission committed any error in issuing the certificate, and that accordingly Sloan's complaint must be dismissed.

This memorandum opinion shall constitute the court's findings of fact and conclusions of law, pursuant to the provisions of Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A.

IT IS ORDERED AND ADJUDGED that the relief prayed for in the complaint be denied and that the complaint be and it is hereby dismissed.

Appendix B

DECISION AND ORDER

Service Date
November 8, 1961

At a Session of the Interstate Commerce Commission, Division 1, *Commissioners Walrath, Webb and Tucker*, (Commissioner Walrath did not participate) held at its office in Washington, D. C., on the 27th day of October, A. D. 1961.

No. MC-115495 (Sub-No. 3)

UNITED PARCEL SERVICE, INC., EXTENSION—
MIDWESTERN STATES
(Cincinnati, Ohio)

Upon consideration of the application and record in the above-entitled proceeding, including the examiner's report and recommended order, the exceptions filed thereto by Railway Express Agency, Inc., and jointly by Orscheln Bros. Truck Lines, Inc., L. A. Tucker Truck Lines, Inc., and Sloan's Moving and Storage Co., Inc., and applicant's reply, and

It appearing, That the exceptions and reply raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report by Division 1 discussing the evidence in the light of such pleadings;

And it further appearing, That the examiner recommended the granting to applicant of a certificate of public convenience and necessity, authorizing the operations described in the appendix hereto;

Wherefore, and good cause appearing therefor:

We find, That the exceptions filed herein are without merit; and that the statement of facts, the conclusions and the findings of the examiner being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That the said application for a certificate, except to the extent granted in said report, be, and it is hereby, denied.

It is further ordered, That upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, and with our rules and regulations thereunder, within the time specified in the next succeeding paragraph, an appropriate certificate will be issued.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made herein shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

HAROLD D. McCOY
Secretary

(Seal)

Appendix C

INTERSTATE COMMERCE ACT:

Section 5 (49 U. S. C. Section 5):

"(2) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or for a carrier by railroad to acquire trackage rights over, a joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

* * * * *

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed

transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

* * * * *

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control, or management in a common interest of any two or more carriers, however such result

is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

* * * * *

Section 207 (49 U. S. C. 307):

"(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

* * * * *

Section 210 (49 U. S. C. Section 310):

"Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest

and with the national transportation policy declared in this Act—

(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and

(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

ADMINISTRATIVE PROCEDURE ACT:

Section 8(b) (5 U. S. C. Section 1007):

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The rec-

ord shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

* * * * *

Section 10 (5 U. S. C. Section 1009):

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken by the rule or prejudicial error."